COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP127-CR **Cir. Ct. No. 2003CF5704**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROMEY J. HODGES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Romey J. Hodges appeals from a judgment of conviction for first-degree reckless homicide, and from a postconviction order denying his motion for sentencing relief. The issues are whether the trial court erroneously exercised its sentencing discretion by: (1) failing to meaningfully

consider Hodges's mental and emotional limitations; (2) failing to explain how the confinement term was the minimum amount of custody necessary to achieve the sentencing considerations ("minimum custody standard"); and (3) imposing an unduly harsh and excessive sentence. We conclude that the trial court properly exercised its sentencing discretion by considering the primary sentencing factors, including Hodges's character and his limitations, and by explaining the reasons for its sentence, which was not unduly harsh or excessive. Therefore, we affirm.

¶2 Hodges pled guilty to first-degree reckless homicide, in violation of WIS. STAT. § 940.02(1) (amended Feb. 1, 2003). The prosecutor did not recommend a specific term of incarceration; the presentence investigator recommended a sentence in the range of twenty-seven to thirty-five years, comprised of a twenty- to twenty-five-year period of confinement, followed by a seven- to ten-year period of extended supervision. Hodges recommended a forty-year sentence, with a five- to ten-year period of confinement. The trial court imposed a thirty-six-year sentence, to run consecutive to any other sentence, comprised of twenty- and sixteen-year respective periods of confinement and extended supervision. Hodges moved for sentencing relief, contending that the twenty-year period of confinement was excessive because the trial court failed to meaningfully consider certain aspects of his character, notably his mental and emotional limitations. The trial court denied the motion, citing to its sentencing references to the very factors Hodges claimed it only considered in "passing."

> ¶3 When a criminal defendant challenges the sentence imposed by the [trial] court, the defendant has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue. When reviewing a sentence imposed by the [trial] court, we start with the presumption that the [trial] court acted reasonably. We will not interfere with the [trial] court's sentencing decision unless the [trial] court erroneously exercised its discretion.

State v. Lechner, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998) (citations and footnote omitted).

¶4 The primary sentencing factors are the gravity of the offense, the character of the offender, and the need for public protection. ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). The trial court's obligation is to consider the primary sentencing factors, and to exercise its discretion in imposing a reasoned and reasonable sentence. *See* ***id.***. The trial court has an additional opportunity to explain its sentence when challenged by postconviction motion. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

¶5 Initially we address the trial court's consideration of the primary sentencing factors to demonstrate its proper exercise of sentencing discretion. The trial court considered two presentence investigation reports (one from the Department of Corrections investigator, and another from a defense sentencing and dispositional specialist), correspondence from various sources, witnesses on behalf of the victim and others on behalf of Hodges, the sentencing presentations of the prosecutor and of defense counsel, and Hodges's allocution.

¶6 The trial court considered

> the offense severity for this First Degree Reckless Homicide [a]s obviously in the aggravated range…. For no good reason, no objective reason, if there is any such a reason, [Hodges] decided to buy a gun, go out walking with it. [Hodges] got scared. [Hodges] shot and killed a man who approached [him] in what [he] felt was a threatening way but few others would … find that to be a threatening way.

The trial court was also mindful that "[the victim] was shot repeatedly in his legs, his arms, his chest and back, and he died about five hours later." It explained the

problem with "gun possession. If you have a firearm … out of fear it is often used."

¶7 Hodges's principal criticism is that the trial court's allegedly cursory consideration of his mental and emotional limitations precluded any meaningful consideration of his character. Hodges characterizes the trial court's undisputed references to his limitations as merely a "passing reference." We disagree with that characterization; the trial court extensively considered Hodges's character. The defense sentencing specialist presented a comprehensive report, eloquently and persuasively explaining how Hodges's limitations and his tragic upbringing accounted for many of his problems with the law, and for his poor handling of the situation, which resulted in a first-degree reckless homicide. The trial court considered Hodges's young age and his serious educational and emotional limitations. It recognized the absence of

> structure … love … discipline … education, [and] everything necessary to raise [Hodges] as a law-abiding citizen[, which] did not continue outside of those shorter foster placements. … there appeared to be no one holding [him] to the consequences of [his] actions, and once [Hodges] hit 14 one sees it in the correctional history. No consequences and no one holding [him] to [his] own consequence – the consequences of [his] own actions means society has to step in to control [him] because [he] could not control [him]self.

It considered these as mitigating factors, and gave Hodges credit for accepting responsibility, and demonstrating apparently genuine remorse. The trial court acknowledged that Hodges's

> [c]riminal culpability and responsibility are somewhat mitigated by [his] lower functioning level and [his] youth. Also, [his] intellectual functioning is not high. [His] education level is quite low, and those who care about [him] and those who teach [him] indicate that [he] ha[s] a low maturity level….

¶8 In its postconviction order, the trial court reviewed its sentencing comments, and confirmed that

> this Court covered every aspect of the offense, the seriousness of the crime, the defendant's character, his background, his prior juvenile history, and the need for community protection. The Court considered in particular the defendant's learning disability and cognitive level, found that he was immature emotionally and intellectually, and concluded that these factors affected his judgment to the detriment of the community. (Tr. 4/2/04, pp. 42, 47) For these reasons, the Court determined that the defendant presented a serious risk to the community for which a substantial period of incarceration was warranted.

¶9 The trial court extensively considered Hodges's character including his mental and emotional limitations. Although the facts and other reasonable inferences could have supported a different exercise of discretion, Hodges has not shown that his sentence was predicated on some unreasonable or unjustifiable basis, only that the trial court exercised its discretion differently than he had hoped it would. That, however, is not an erroneous exercise of discretion. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (our inquiry is whether discretion was exercised, not whether it could have been exercised differently).

¶10 The trial court also considered the need for public protection. Although the defense sentencing specialist expressed concern that a lengthy term of incarceration might be damaging to the emotionally fragile Hodges, the trial court explained that its overriding concern was for the community's safety. It commented that Hodges's correctional history demonstrated that the lack of structure in Hodges's life rendered him a high risk to the community. It also noted that Hodges's difficulty in empathizing with his victims also rendered him a community risk "because it makes it more likely that [Hodges] would commit

future criminal behavior." This risk also accounted for the trial court's consideration of the minimum custody standard. The trial court commented that

> Hodges is going to spend a substantial period of the rest of his life incarcerated to protect the community from him, to punish him for his action, to supervise him closely, to teach him the things his parents failed to do. There are no winners here. One hopes that a different person emerges from this initial term of confinement.
>
> Mr. Hodges, in the meantime we cannot take the chance of this happening again. The [victim's] family can take some solace that for many years there will not be another death like their son's at your hands.

¶11 The trial court considered each of the three primary sentencing factors including Hodges's character. The weight the trial court assigns to each factor is a discretionary determination. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Refusing to minimize a first-degree reckless homicide, in the context of a defendant's mental and emotional limitations and his "chaotic" upbringing, is not an erroneous exercise of sentencing discretion.

¶12 Hodges also claims that a thirty-six-year sentence with a twenty-year period of confinement is excessive, particularly in the context of his mental and emotional limitations. A sentence is unduly harsh when it is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Id.*** "A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983). We review an allegedly

harsh and excessive sentence for an erroneous exercise of discretion. *See* ***State v. Giebel***, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995).

¶13 The maximum potential sentence for first-degree reckless homicide is sixty years. *See* WIS. STAT. §§ 940.02(1); 939.50(3)(b). The trial court imposed a thirty-six-year sentence. Imposing a thirty-six-year sentence, with a twenty-year period of confinement, on a defendant (albeit with serious limitations) with a criminal record, for a senseless (but not accidental) first-degree reckless homicide with a firearm, where he repeatedly shot the victim at close range does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas***, 70 Wis. 2d at 185. Stated otherwise, imposing less than two-thirds of the maximum potential sentence is not unduly harsh nor disproportional after applying the facts to the primary sentencing factors. *See* ***Daniels***, 117 Wis. 2d at 22.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).